



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-140

v.

Franklin Fire District #2 (Somerset)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that in light of the Custodian's certification and the evidence provided by both the Complainant and GRC staff, the Custodian has failed to comply with the terms of the Council's May 29, 2012 Interim Order because the Custodian has failed to either provide the Complainant with the requested purchase order inquiry by vendor report, or provide the GRC with a legal certification indicating that the Custodian is unable to produce said report *because the Fire District does not utilize the requisite version of the QuickBooks software system*. Additionally, because it still may be possible for the Custodian to produce the requested record, this complaint should be referred to the Office of Administrative Law for a full hearing to determine whether it is, in fact, possible for the Custodian to produce the requested report from the Fire District's QuickBooks software. The Administrative Law Judge should also determine whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances, as well as the applicability of prevailing party attorney fees.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 27, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

Jeff Carter¹
Complainant

GRC Complaint No. 2011-140

v.

Franklin Fire District #2 (Somerset)²
Custodian of Records

Records Relevant to Complaint: Copies, sent via e-mail, of purchase order inquiry by vendor report (including any reasonably construed variation thereof) detailing purchase orders issued (including any reasonably construed variation thereof) for Network Blade, LLC, 49 Marcy Street, Somerset, NJ 08873, for budget years 2005, 2006, 2007, 2008, 2009, 2010 and 2011.

Request Made: March 14, 2011

Response Made: None

Custodian: William Kleiber

GRC Complaint Filed: April 26, 2011³

Background

May 29, 2012

Government Records Council's ("Council") Interim Order. At its May 29, 2012 public meeting, the Council considered the May 22, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian legally certified that it *may* be possible to produce the requested report from the QuickBooks software, the Custodian has failed to

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Eric M. Perkins, Esq. (Skillman, NJ).

³ The GRC received the Denial of Access Complaints on said date.

bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall either provide the Complainant with the requested purchase order inquiry by vendor report, or provide the GRC with a legal certification indicating that the Custodian is unable to produce said report because the Fire District does not utilize the requisite version of the QuickBooks software system. In the event the Custodian certifies that he is unable to produce the requested purchase order inquiry by vendor report, the Custodian shall also provide a certification identifying the specific version of the QuickBooks software utilized by the Fire District.

3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

May 30, 2012

Council's Interim Order distributed to the parties.

June 1, 2012⁶

Custodian's response to the Council's Interim Order. The Custodian certifies that as Treasurer of the Franklin Fire District #2, he maintains the Board's financial records on the Intuit software product known as QuickBooks. The Custodian certifies that the software which the Board purchased and utilizes is known as the "Premier General Business Edition" of which the Board has recently uploaded the 2012 version. The Custodian certifies that he has never had a formal course of instruction in the use of the QuickBooks product. The Custodian certifies that he enters the basic information required by QuickBooks. Additionally, the Custodian certifies that he does not know how to run a "vendor report" using the QuickBooks software. The Custodian further

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁶ The GRC received the Custodian's certification on June 5, 2012.

certifies that he does not know if the version of the software the Board uses is capable of providing such a report.

June 5, 2012

E-mail from GRC to Complainant. The GRC forwards the Complainant the Custodian's certification dated June 1, 2012.

June 6, 2012

Complainant's Certification in response to the Custodian's Certification. The Complainant certifies that in the Custodian's certification dated June 1, 2012, the Custodian certified that he maintains the Board's financial records on the Intuit software product known as QuickBooks. As such, the Complainant asserts that it is factually undisputed that the Custodian has access to the records sought in his OPRA request.

The Complainant also certifies that in the Custodian's certification dated June 1, 2012, the Custodian certified that he has never had a formal course of instruction in the use of the QuickBooks product and that he does not know how to run a "vendor report." The Complainant certifies that he has never used the QuickBooks software, yet on June 6, 2012 he accessed the Intuit QuickBooks support website and easily located several step by step instructions on how to generate various reports, including instructions for "creating a Purchase Order Report that includes Item and Item Description" which works with the 2012 version of the QuickBooks software.⁷

The Complainant contends that the Custodian's response to the Council's May 29, 2012 Interim Order is a blatant defiance of said Order and an act of knowingly and willfully withholding the responsive records from the Complainant. The Complainant certifies that both he and the GRC (in its Interim Order) were able to access the simple instructions on how to generate the requested report from the QuickBooks software, yet the Custodian keeps certifying that he does not know how to run the report.

The Complainant requests that the GRC:

1. Actively pursue, or refer to the appropriate investigative authority, the Custodian's apparent factually controverted Statement of Information and certifications in this matter;
2. Take judicial notice of the Custodian's conduct in GRC Complaint Nos. 2011-124, 2011-125, 2011-126 and 2011-127 (now pending before the Office of Administrative Law) which involve vendor "Network Blade)⁸;
3. Find that the Custodian violated OPRA by failing to provide the Complainant with the records requested within seven (7) business days;
4. Find that the Complainant is a prevailing party and order an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6;

⁷ The Complainant provides the following website links as references:

<http://support.quickbooks.intuit.com/support/search2.aspx?q=create+purchase+order+report>;

<http://support.quickbooks.intuit.com/support/Articles/HOW13118>.

⁸ The Complainant provides additional details regarding the facts of these complaints; however, said complaints are not relevant to the adjudication of this instant complaint.

5. Find that the Custodian knowingly and willfully violated OPRA, knowing that what he was doing was consciously wrong, and that the Custodian unreasonably denied access to the records under the totality of the circumstances, warranting the imposition of civil penalties pursuant to N.J.S.A. 47:1A-11; and
6. Order the Custodian to immediately disclose all outstanding responsive records.

Analysis

Whether the Custodian complied with the Council's May 29, 2012 Interim Order?

The Council's May 29, 2012 Interim Order directed the Custodian to:

- Provide the Complainant with the requested purchase order inquiry by vendor report; or
- Provide the GRC with a legal certification indicating that the Custodian is unable to produce said report because the Fire District does not utilize the requisite version of the QuickBooks software system. In the event the Custodian certifies that he is unable to produce the requested purchase order inquiry by vendor report, the Custodian shall also provide a certification identifying the specific version of the QuickBooks software utilized by the Fire District.

The Council's May 29, 2012 also required the Custodian to comply with said Order within five (5) business days, or by June 6, 2012.

On June 5, 2012, within the required five (5) business days, the GRC received the Custodian's certification in response to the Council's Interim Order. In said certification, the Custodian legally certified that the software which the Board purchased and utilizes is known as the "Premier General Business Edition" of which the Board recently uploaded the 2012 version. The Custodian certified that he has never had a formal course of instruction in the use of the QuickBooks product. The Custodian certified that he enters the basic information required by QuickBooks. Additionally, the Custodian certified that he does not know how to run a "vendor report" using the QuickBooks software. The Custodian further certified that he does not know if the version of the software the Board uses is capable of providing such a report.

Although the Custodian did respond to the Council's Interim Order within the requisite five (5) business days, the Custodian failed to provide the Complainant with the requested purchase order inquiry by vendor report. As the alternative option in the Interim Order, the Custodian has also failed to provide the GRC with a legal certification indicating that the Custodian is unable to produce said report *because the Fire District does not utilize the requisite version of the QuickBooks software system* (while identifying the version of the software utilized by the Fire District). Instead, the Custodian certified that the Fire District uses the "Premier General Business Edition" of which the Board recently uploaded the 2012 version and that *he does not know how to run a "vendor report" using the QuickBooks software*. The Custodian further certified that *he does not know if the version of the software the Board uses is capable of providing such a report*. The Custodian's certified response that he is unable to produce the requested report is not because the software is incapable of producing the report, but

rather because the Custodian is unaware of whether the production of such a report is possible. The Custodian provided no evidence that he even attempted to produce the requested report. As the Council stated in the May 22, 2012 Findings and Recommendations of the Executive Director:

“Based on the Council’s holding in Rivera v. Town of Guttenberg, Police Department, GRC Complaint No. 2006-154 (Interim Order dated February 2008), a requestor should not be penalized in any way when a custodian or other employee does not know how to utilize agency software that is required to fulfill an OPRA request. Penalization in this instant complaint would be denying access to the request on the basis that the custodian is untrained on how to produce the requested report from the QuickBooks software.”

Additionally, in the May 22, 2012 Findings and Recommendations of the Executive Director, the Council took judicial notice of the following web pages on Intuit QuickBook Support’s website, which provide step by step instructions on how to produce purchase order reports:

- http://support.quickbooks.intuit.com/support/pages/inproducthelp/core/qb2k12/contentpackage/verticals/reports_other_vertical/rpt_con_po_vendor.html, specifically states that the “open purchase orders by vendor report” is available only in the Contractor, Retail, and Accountant editions.⁹
- http://support.quickbooks.intuit.com/support/pages/inproducthelp/core/qb2k12/contentpackage/verticals/reports_other_vertical/rpt_con_po_vendor_detail.html, specifically states that the “open purchase orders by vendor detail report” is available only in the Contractor and Accountant editions.¹⁰

The above webpages indicate that these reports can only be generated from the Contractor, Retail or Accountant editions of the QuickBooks software. The Custodian certified that the Fire District utilizes the “Premier General Business Edition.” Thus, it is reasonable to conclude that the Fire District’s current software is incapable of producing the two (2) specific reports identified in the above webpages.

However, on June 6, 2012 the Complainant provided the GRC with a certification containing references to two (2) additional webpages from Intuit QuickBook Support’s website:

- <http://support.quickbooks.intuit.com/support/search2.aspx?q=create+purchase+order+report>
- <http://support.quickbooks.intuit.com/support/Articles/HOW13118>.

The Complainant certified that he has never used the QuickBooks software, yet on June 6, 2012 he accessed the Intuit QuickBooks support website and easily located several step by step instructions on how to generate various reports, including

⁹ GRC staff accessed this website on May 4, 2012.

¹⁰ GRC staff accessed this website on May 4, 2012.

instructions for “creating a Purchase Order Report that includes Item and Item Description” which works with the 2012 version of the QuickBooks software.

Additionally, on June 13, 2012 GRC staff accessed the following website: <http://quickbooks.intuit.com/premier/demos/>. Said website contains a 6 minute and 27 second video demonstration on how to generate various reports, including purchase order reports, from the 2012 QuickBooks Premier software.

Pursuant to *N.J.A.C. 1:1-15.2(a)* and (b), official notice may be taken of judicially noticeable facts (as explained in *N.J.R.E. 201* of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant’s record of convictions were exclusively in New Jersey. *See Sanders v. Division of Motor Vehicles*, 131 *N.J. Super.* 95 (App. Div. 1974).

Thus, the Council takes judicial notice of the following webpages, as described above, on Intuit QuickBook Support’s website:

- <http://quickbooks.intuit.com/premier/demos/>
- <http://support.quickbooks.intuit.com/support/search2.aspx?q=create+purchase+order+report>
- <http://support.quickbooks.intuit.com/support/Articles/HOW13118>.

Therefore, in light of the Custodian’s certification and the evidence provided by both the Complainant and GRC staff, the Custodian has failed to comply with the terms of the Council’s May 29, 2012 Interim Order because the Custodian has failed to either provide the Complainant with the requested purchase order inquiry by vendor report, or provide the GRC with a legal certification indicating that the Custodian is unable to produce said report *because the Fire District does not utilize the requisite version of the QuickBooks software system*. Additionally, because it still *may* be possible for the Custodian to produce the requested record, this this complaint should be referred to the Office of Administrative Law for a full hearing to determine whether it is, in fact, possible for the Custodian to produce the requested report from the Fire District’s QuickBooks software. The Administrative Law Judge should also determine whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances, as well as the applicability of prevailing party attorney fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that in light of the Custodian’s certification and the evidence provided by both the Complainant and GRC staff, the Custodian has failed to comply with the terms of the Council’s May 29, 2012 Interim Order because the Custodian has failed to either provide the Complainant with the requested purchase order inquiry by vendor report, or provide the GRC with a legal certification indicating that the Custodian is unable to produce said report *because*

the Fire District does not utilize the requisite version of the QuickBooks software system. Additionally, because it still *may* be possible for the Custodian to produce the requested record, this this complaint should be referred to the Office of Administrative Law for a full hearing to determine whether it is, in fact, possible for the Custodian to produce the requested report from the Fire District's QuickBooks software. The Administrative Law Judge should also determine whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances, as well as the applicability of prevailing party attorney fees.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

May 29, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-140

v.

Franklin Fire District #2 (Somerset)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council ("Council") considered the May 22, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian legally certified that it *may* be possible to produce the requested report from the QuickBooks software, the Custodian has failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall either provide the Complainant with the requested purchase order inquiry by vendor report, or provide the GRC with a legal certification indicating that the Custodian is unable to produce said report because the Fire District does not utilize the requisite version of the QuickBooks software system. In the event the Custodian certifies that he is unable to produce the requested purchase order inquiry by vendor report, the Custodian shall also provide a certification identifying the specific version of the QuickBooks software utilized by the Fire District.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of May, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: May 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-140

v.

**Franklin Fire District #2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies, sent via e-mail, of purchase order inquiry by vendor report (including any reasonably construed variation thereof) detailing purchase orders issued (including any reasonably construed variation thereof) for Network Blade, LLC, 49 Marcy Street, Somerset, NJ 08873, for budget years 2005, 2006, 2007, 2008, 2009, 2010 and 2011.

Request Made: March 14, 2011

Response Made: None

Custodian: William Kleiber

GRC Complaint Filed: April 26, 2011³

Background

March 14, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail and facsimile referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail.

April 26, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated March 14, 2011 sent via e-mail
- Complainant's OPRA request dated March 14, 2011 sent via facsimile (including transmission verification)

The Complainant states that he submitted his OPRA request on March 14, 2011 for a copy of "a purchase order inquiry by vendor report." The Complainant states that he has not received any response to his request, which constitutes a deemed denial of his

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Eric M. Perkins, Esq. (Skillman, NJ).

³ The GRC received the Denial of Access Complaints on said date.

request. The Complainant also states that he has received this record from other governmental entities.

The Complainant requests the following from the GRC:

1. A finding that the Custodian violated OPRA by failing to provide the records requested;
2. A finding that the Complainant is a prevailing party entitled to an award of attorney's fees pursuant to N.J.S.A. 47:1A-6; and
3. A determination regarding whether the Custodian knowingly and willfully violated OPRA.

Additionally, the Complainant does not agree to mediate this complaint.

May 17, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

May 25, 2011

E-mail from Custodian's Counsel to GRC. Counsel requests a five (5) business day extension of time to submit the Custodian's completed SOI.

May 25, 2011

E-mail from the GRC to Custodian's Counsel. The GRC grants a five (5) business day extension of time for Counsel to submit the Custodian's completed SOI.

June 7, 2011

Letter from Custodian's Counsel to GRC.⁴ Counsel states that the District does not maintain a "purchase order inquiry by vendor report." Counsel further states that the District utilizes an electronic check system.

June 9, 2011

Custodian's SOI with Complainant's Denial of Access Complaint attached. The Custodian certifies that he received the Complainant's OPRA request on March 14, 2011 and that he did not provide any response to the Complainant's request.

The Custodian certifies that the date on which any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable because no records responsive to the Complainant's OPRA request exist.⁵

April 21, 2012

Complainant's Certification. The Complainant certifies that a "purchase order by vendor report" is a report commonly used in other Franklin Township fire districts to present a listing of purchase orders that were issued, along with other relevant data

⁴ Counsel submitted said letter as the cover page to the Custodian's SOI submission dated June 9, 2011.

⁵ The Custodian did not certify to the search undertaken to locate the records responsive to the Complainant's request.

associated with those purchase orders. The Complainant states that both the Custodian and the Custodian's Counsel claim that no such report exists.

The Complainant certifies that after filing several subsequent OPRA requests, he ascertained that the District utilized Intuit's QuickBooks software program as its "electronic check system" (as described in Counsel's June 7, 2011 letter). The Complainant certifies that the OPRA request which is the subject of this instant complaint sought "purchase order inquiry by vendor report (including any reasonably construed variation thereof)" as the type of record, and further specified that the content and/or subject would include a "detail of purchase orders issued (including any reasonably construed variation thereof)." Additionally, the Complainant certifies that he has attached a copy of the step-by-step instructions from the Intuit QuickBooks website explaining how to print:

- An "open purchase orders by vendor report" from the QuickBooks software. The instructions are readily available at http://support.quickbooks.intuit.com/support/pages/inproducthelp/core/qb2k12/contentpackage/verticals/reports_other_vertical/rpt_con_po_vendor.html.
- An "open purchase orders by vendor detail" report from the QuickBooks software. The instructions are readily available at http://support.quickbooks.intuit.com/support/pages/inproducthelp/core/qb2k12/contentpackage/verticals/reports_other_vertical/rpt_con_po_vendor_detail.html.

However, the Complainant acknowledges that the "open purchase orders by vendor report" is available only in the Contractor, Retail and Accountant editions and the "open purchase orders by vendor detail" report is available only in the Contractor and Accountant editions. The Complainant certifies that the Custodian denied him access to a copy of the instruction manual cover page for the District's electronic check system, which is the subject of a separate Denial of Access Complaint, and as such, the Complainant is unable to determine the specific edition of the QuickBooks software the District is currently utilizing.

The Complainant asserts that the facts presented in this matter establish the Custodian's conscious, intentional and deliberate acts to unreasonably deny the Complainant access to records for which no lawful basis for denial was ever established (the Custodian's SOI in this matter indicates that "no response was given"). Based on the foregoing, the Complainant requests that the GRC:

1. Order the Custodian to reveal the exact version of the financial software used in the District and if the records sought in this complaint can be produced, that the GRC actively pursue, or refer to the appropriate investigative authority, the Custodian's factually controverted SOI certification in this matter;
2. Find that the Custodian violated OPRA by failing to provide the Complainant with the records sought within seven (7) business days;
3. Find that the Complainant is a prevailing party and order an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6;

4. Find that the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, warranting the imposition of civil penalties pursuant to N.J.S.A. 47:1A-11; and
5. Order the Custodian to immediately release all outstanding records responsive.

April 24, 2012

Letter from the GRC to Custodian. The GRC requests the following information from the Custodian via legal certification, pursuant to N.J. Court Rule 1:4-4:

1. What is the name of the electronic check system utilized by Franklin Fire District #2?
2. What type of information does this electronic check system capture?
3. Can the electronic check system run a query/generate a purchase order inquiry by vendor report for Network Blade, LLC, 49 Marcy Street, Somerset, NJ 08873, for budget years 2005, 2006, 2007, 2008, 2009, 2010 and 2011? If not, explain why.
4. Does the electronic check system, or any other database/software system maintained by the Franklin Fire District, contain information detailing purchase orders issued for Network Blade, LLC, 49 Marcy Street, Somerset, NJ 08873, for budget years 2005, 2006, 2007, 2008, 2009, 2010 and 2011?

The GRC requests that the Custodian submit his legal certification by the close of business on May 1, 2012.

May 3, 2012

E-mail from the GRC to Custodian and Counsel. The GRC states that on April 24, 2012 it sent a request for a legal certification from the Custodian to be submitted to the GRC by the close of business on May 1, 2012. The GRC states that to date, it is not in receipt of said certification. The GRC states that if the Custodian's certification is not received by the GRC by the close of business on May 4, 2012, the GRC will adjudicate the complaint based solely on the submissions already submitted and the GRC will not consider any submissions received after May 4, 2012.

May 3, 2012

Custodian's Certification. The Custodian certifies that as Treasurer, he maintains the Board's financial records on the Intuit software known as QuickBooks and that this is the electronic check system he uses to issue checks for the Board's business. The Custodian certifies that he has never had a formal course of instruction in the use of the QuickBooks product. The Custodian certifies that he enters the basic information required by QuickBooks to establish and pay each payee. The Custodian certifies that he does not know how to run a query/generate a purchase order inquiry by vendor report for Network Blade or any other vendor. The Custodian certifies that it may be within the ability of the QuickBooks product to generate such a report, but he has never done so for any vendor.

Additionally, the Custodian certifies that the QuickBooks product does not contain the fundamental information on purchase orders issued for Network Blade to the extent that such information is required by the system to issue electronic checks.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In this instant complaint, the Complainant states that he submitted his OPRA request on March 14, 2011. The Custodian certified in his SOI that he received said request on March 14, 2011. The Custodian also certified that he did not provide the Complainant with any response to his OPRA request.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*.

⁶ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In this instant complaint, the Complainant sought access to a copy of a purchase order inquiry by vendor report (including any reasonably construed variation thereof) detailing purchase orders issued (including any reasonably construed variation thereof) for Network Blade, LLC, 49 Marcy Street, Somerset, NJ, 08873, for budget years 2005, 2006, 2007, 2008, 2009, 2010 and 2011. The Custodian certified in his SOI that no records responsive to the Complainant’s OPRA request exist.

However, the Complainant submitted a certification on April 21, 2012 indicating that the Fire District utilizes Intuit’s QuickBook’s software system as its electronic check system. Additionally, the Complainant provided website links to instructions for printing an “open purchase orders by vendor report” and an “open purchase orders by vendor detail” from the QuickBooks software system. The Complainant acknowledged that said reports can only be generated from specific software versions, but he is unable to determine which version the District utilizes because the Custodian denied access to the cover page of the instruction manual in an OPRA request that is not at issue in this instant complaint.

Pursuant to *N.J.A.C.* 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in *N.J.R.E.* 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. *See Sanders v. Division of Motor Vehicles*, 131 *N.J. Super.* 95 (App. Div. 1974).

Thus, the Council takes judicial notice of the following web pages on Intuit QuickBooks Support's website:

- http://support.quickbooks.intuit.com/support/pages/inproducthelp/core/qb2k12/contentpackage/verticals/reports_other_vertical/rpt_con_po_vendor.html, specifically states that the "open purchase orders by vendor report" is available only in the Contractor, Retail, and Accountant editions.⁷
- http://support.quickbooks.intuit.com/support/pages/inproducthelp/core/qb2k12/contentpackage/verticals/reports_other_vertical/rpt_con_po_vendor_detail.html, specifically states that the "open purchase orders by vendor detail report" is available only in the Contractor and Accountant editions.⁸

In light of the Complainant's certification, the GRC requested a certification from the Custodian in response to the following questions:

1. What is the name of the electronic check system utilized by Franklin Fire District #2?
2. What type of information does this electronic check system capture?
3. Can the electronic check system run a query/generate a purchase order inquiry by vendor report for Network Blade, LLC, 49 Marcy Street, Somerset, NJ 08873, for budget years 2005, 2006, 2007, 2008, 2009, 2010 and 2011? If not, explain why.
4. Does the electronic check system, or any other database/software system maintained by the Franklin Fire District, contain information detailing purchase orders issued for Network Blade, LLC, 49 Marcy Street, Somerset, NJ 08873, for budget years 2005, 2006, 2007, 2008, 2009, 2010 and 2011?

The Custodian certified that as Treasurer, he maintains the Board's financial records on the Intuit software known as QuickBooks and that this is the electronic check system he uses to issue checks for the Board's business. The Custodian certified that he has never had a formal course of instruction in the use of the QuickBooks product. The Custodian certified that he enters the basic information required by QuickBooks to establish and pay each payee. The Custodian certified that he does not know how to run a query/generate a purchase order inquiry by vendor report for Network Blade or any other vendor. The Custodian certified that it may be within the ability of the QuickBooks product to generate such a report, but he has never done so for any vendor.

⁷ GRC staff accessed this website on May 4, 2012.

⁸ GRC staff accessed this website on May 4, 2012.

In Rivera v. Town of Guttenberg, Police Department, GRC Complaint No. 2006-154 (Interim Order dated February 2008), the custodian attempted to charge the requestor a special service charge which included fees to train personnel on how to utilize the specific equipment that was necessary to fulfill the complainant's OPRA request. The Council determined that:

"the \$2,099.41 charge proposed by the Custodian is not reasonable. The proposed charge includes a \$375.57 fee for instructing the computer consultant how to play calls outside of the software. The cost to obtain the ability to play back calls to the Police Department is one which the Town of Guttenberg Police Department should absorb, and the Complainant should not be charged for an administrative function inherent in the Police Department's duties...Moreover, the \$2,099.41 charge proposed by the Custodian includes \$500 to train Sgt. Conversano how to locate and listen to audio files from the computerized system. Again, this is a cost which the Police Department should absorb; the Complainant should not be charged for this administrative training of Police Department personnel."

Although no special service charges is at issue in this instant complaint, the question of agency personnel not knowing how to utilize software maintained by the agency is at issue. Based on the Council's holding in Rivera, supra, a requestor should not be penalized in any way when a custodian or other employee does not know how to utilize agency software that is required to fulfill an OPRA request. Penalization in this instant complaint would be denying access to the request on the basis that the custodian is untrained on how to produce the requested report from the QuickBooks software. The Custodian certified that it *may* be possible to produce the requested report, but he is unaware of how to do so. The Complainant provided website links to specific instructions on how to produce the requested reports. Said reports, however, can only be produced from certain versions of the QuickBooks software. The Custodian did not provide evidence to the Council as to which version of the QuickBooks software the Custodian utilizes and consequently, whether the Custodian is actually able to produce the requested report.

Therefore, because the Custodian legally certified that it *may* be possible to produce the requested report from the QuickBooks software, the Custodian has failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall either provide the Complainant with the requested purchase order inquiry by vendor report, or provide the GRC with a legal certification indicating that the Custodian is unable to produce said report because the Fire District does not utilize the requisite version of the QuickBooks software system. In the event the Custodian certifies that he is unable to produce the requested purchase order inquiry by vendor report, the Custodian shall also provide a certification identifying the specific version of the QuickBooks software utilized by the Fire District.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian legally certified that it *may* be possible to produce the requested report from the QuickBooks software, the Custodian has failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall either provide the Complainant with the requested purchase order inquiry by vendor report, or provide the GRC with a legal certification indicating that the Custodian is unable to produce said report because the Fire District does not utilize the requisite version of the QuickBooks software system. In the event the Custodian certifies that he is unable to produce the requested purchase order inquiry by vendor report, the Custodian shall also provide a certification identifying the specific version of the QuickBooks software utilized by the Fire District.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁹ to the Executive Director.¹⁰**

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian
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4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

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Executive Director

May 22, 2012

must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.